

Journal of
WORLD TRADE

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers,
Inc. 7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Journal of World Trade is published six times per year.

Print subscription prices, including postage (2013): EUR 1015/USD 1353/GBP 746.

Online subscription prices (2013): EUR 940/USD 1253/GBP 691 (covers two concurrent users).

Journal of World Trade is indexed/abstracted in the *European Legal Journals Index*.

Printed on acid-free paper.

ISSN 1011-6702

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Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

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ISSN 1011-6702

Mode of citation: 46:6 J.W.T.

The Appellate Body Approach to the Applicability of Article XX GATT In the Light of *China – Raw Materials*: A Missed Opportunity?

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This article attempts to analyse and investigate the implications of the approach to the applicability of Article XX GATT adopted in the recent China – Raw Materials. Using the decision on the non-availability of Article XX defences for violations of China's WTO-plus commitments on export duties as a backdrop, it scrutinizes the more general, 'systemic' approach to the applicability of Article XX exceptions developed by the WTO dispute settlement bodies, and sheds light on the implications of such approach with respect to the relationship between GATT 1994 and WTO obligations arising from different instruments of the WTO Agreement, such as new members' accession protocols. It also suggests that an exception to this general approach could be envisaged when the fundamental environmental goals protected under Article XX b) and g) are at stake.

1 INTRODUCTION

On 23 July 2012, the WTO Dispute Settlement Body established a Panel under the requests of the United States, the European Union and Japan¹ in order to rule with respect to China's export restrictions on various forms of rare earth elements, tungsten and molybdenum.² It is the second time that China's export

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¹ See WT/DS431/6, WT/DS432/6 and WT/DS433/6. The three complainants requested the establishment of a single panel in accordance with Art. 9.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Apr. 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (Apr. 15, 1994)[hereinafter DSU]. The dispute settlement consultations had been requested on Mar. 13, 2012 (WT/DS431/1, WT/DS432/1 and WT/DS433/1).

² According to the US Geological Survey, rare earth elements are a set of seventeen elements in the periodic table, namely fifteen elements belonging to the family of lanthanides plus scandium and yttrium. These elements play a critical role in the development of many high technology goods and environmental technologies in that they are essential inputs to the manufacture of items such as hybrid vehicles, mobile telephones, computers, televisions and energy efficient lights, wind power generators, and military applications. Tungsten is indispensable for a variety of electrical applications, and molybdenum for a number of metallurgical applications. See United States

regime on raw materials is challenged after the Panel and the Appellate Body rulings in *China – Raw Materials*.³

The filing of a second dispute concerning China's restrictions on the exportation of raw materials reflects the mounting tension between China, on the one hand, and industrialized resource-scarce countries, on the other, over access to critical minerals and metals.⁴ Beijing's quasi monopolistic position in terms of worldwide production and export market share of crucial industrial primary commodities⁵ has, in fact, rendered its most influential trade partners particularly keen to ensure China's compliance with the commitments undertaken in virtue of its participation to the multilateral trading system and, notably, the General Agreement on Tariffs and Trade 1994⁶ and the so-called 'WTO-plus' obligations⁷

Geological Survey, Minerals Yearbook, various metals and minerals, various years, available at <http://minerals.usgs.gov/minerals/pubs/commodity/myb/>.

³ Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011) [hereinafter Panel Report] and Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 31, 2011) [hereinafter Appellate Body Report].

⁴ In particular, the WTO members parties to both disputes, the United States and the European Union, identified rare earths, together with a plurality of other industrial high-tech minerals and metals, as critical to their industrial sector. See National Research Council, *Minerals, Critical Minerals and the US Economy*, The National Academies Press (Washington, DC: The National Academies Press, 2008); Critical Raw Materials for the EU, Report of the Ad Hoc Working Group on Defining Critical Raw Materials (July 30, 2010), available at http://ec.europa.eu/enterprise/policies/rawmaterials/documents/index_en.htm. Accordingly, they have consistently denounced China's export regime on strategic minerals and metals as reflecting an aggressive industrial policy aimed at boosting economic development by discriminating in favour of the Chinese downstream producers and thereby shifting the traditional trade structure toward the manufacturing sector. It has to be noted, however, that the criticality attributed to the access to the challenged materials does not always stem from an absolute scarcity. Indeed, at least in the case of the United States, the 'resource-scarce' label refers to the current geographical concentration of production of the challenged materials, while it does not reflect the worldwide distribution of known reserves. For instance, with respect to rare earths and molybdenum, the United States ranks, respectively, third and second in terms of worldwide known reserves, accounting for, respectively, 9.10% and 28.35%. See Jane Korinek & Jeonghoi Kim, *Export Restrictions on Strategic Raw Materials and Their Impacts on Trade and Global Supply*, 45(2) J. World Trade 255 at 259–261 (2011).

⁵ Currently, China is by far the major worldwide supplier of all the challenged materials, producing respectively 97.45% of rare earths, 80.07% of tungsten, and 41.65% of molybdenum on the global market. See World Mining Data (2011), available at <http://www.wmc.org.pl/sites/default/files/WMD2011.pdf>.

⁶ General Agreement on Tariffs and Trade 1994 (Apr. 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 [hereinafter GATT 1994].

⁷ The so-called 'WTO-plus' obligations are additional, country-specific obligations not otherwise contemplated in the Multilateral Agreements to which newly WTO acceding Members commit to abide by in the process of negotiation of their terms of accession with the incumbent WTO Members. Julia Ya Qin, *'WTO-Plus' Obligations and their Implications for the World Trade Organization Legal System – An appraisal of the China Accession Protocol*, 37(3) J. World Trade 483 at 483–522 (2003).

contained in the Protocol on the Accession of the People's Republic of China⁸ and the related provisions of the Report of the Working Party on the Accession of China.⁹ More generally, however, it is symptomatic of the growing concerns over the proliferation in the use of trade-restrictive measures on the exportation of strategic raw materials by China and other key major players,¹⁰ within a context of well-recognized deficiency in WTO regulation.¹¹

In this perspective, the approach developed by the dispute settlement bodies in *China – Raw Materials* merits great attention for two main reasons. First, by addressing the most controversial issues with regards to the consistency of China's unique regime on export restraints with the WTO Agreement, the Panel and the Appellate Body clarified the scope of, and the interactions between, the main GATT provisions relevant to export restrictions (i.e., Article XI and Article XX) – some of which (e.g., Article XI:2(a)) had never been interpreted before. Second, and most importantly, by exploring China's specific commitments on export duties, they shed light on the 'systemic' relationship between GATT 1994 and different instruments of the WTO Agreement, with particular regards to the availability of Article XX defences for violations of WTO obligations, such as the 'WTO plus' commitments contained in new members' accession protocols, falling outside the scope of the GATT 1994.

The relevance of the comprehensive framework defined in *China – Raw Materials* with regards to the reach of the WTO discipline on export restraints has already been examined in detail and will not be the focus of this article.¹² Rather,

⁸ Accession of the People's Republic of China, Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001) [hereinafter China's Accession Protocol].

⁹ Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and WT/ACC/CHN/49 [hereinafter China's Accession Working Party Report].

¹⁰ In the latest years, a general intensification in the use of export restrictions has been registered for all sectors of trade in natural resources. See World Trade Organization (WTO), World Trade Report 2010: Trade in Natural Resources (WTO, Geneva 2010); Jeonghoi Kim, Recent Trends in Export Restrictions on Raw Materials, in Organization for Economic Co-operation and Development (OECD), The Economic Impact of Export Restrictions on Raw Materials (OECD, Paris 2010); and, for the latest developments, the most recent trade monitoring reports issued by the Director General of the WTO, Pascal Lamy, to the WTO's Trade Policy Review, available at http://www.wto.org/english/news_e/archive_e/trdev_arc_e.htm (last access, July 20, 2012). Export restrictions on 'strategic' minerals and metals, in particular, have increased by the highest incidence with respect to any other sector. In the case of export duties, for instance, seventeen countries imposed export restrictions on mineral products and metals in the period 1995–2002, whereas, in the period 2003–2009, twenty-eight countries resorted to such measures.

¹¹ For a critical discussion on the shortcomings of the GATT discipline on export restrictions see Baris Karapinar, *Export Restrictions and the WTO Law: How to Reform the 'Regulatory Deficiency'*, 45(6) J World Trade 1139, at 1139–1155 (2012).

¹² For a thorough analysis of the legal boundaries incumbent on WTO Members on the use of export restrictions, and the role of guidance of WTO case law – especially of *China – Raw Materials* – played in this respect see Baris Karapinar, *Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis*, 15(2) J Intl. Econ. L. 443–479 (2011).

this article seeks to investigate the implications of the approach to the applicability of Article XX GATT defined in *China – Raw Materials* with respect to some underlying problems at the core of the functioning of the multilateral trading system, namely the systemic relationship between GATT Article XX and WTO obligations contained in other components of the WTO Agreement, and to draw some critical comments on the opportunity of the conclusions reached by the Appellate Body. This article is organized as follows. Section 2 analyses the reasoning adopted in *China – Raw Materials* to found the decision on the non-availability of Article XX exceptions for violations of China's WTO-plus commitments on the use of export duties;¹³ section 3 discusses the more general approach developed by the dispute settlement bodies to the applicability of Article XX for violations of WTO-plus obligations on export restraints contained in the accession protocols and, more generally, for violations of obligations falling outside the scope of the GATT 1994, and analyses the implications of this approach for China in the light of the new dispute on rare earths, as well as for other members assuming WTO-plus commitments in this respect; section 4 investigates whether alternative venues could have been explored by the DSB tribunals so as to rule in favour of the availability of Article XX exceptions in the light of the fundamental non-trade concerns invoked, i.e., the public health and conservation goals protected under Article XX b) and g) of the GATT 1994.

2 CHINA'S WTO-PLUS COMMITMENTS ON EXPORT DUTIES AND THE NON-AVAILABILITY OF ARTICLE XX GATT IN *CHINA: RAW MATERIALS*

Under the GATT 1994, WTO Members are not under any obligation with regards to the use of export duties. Article XI:I, in fact, provides for a general obligation to refrain from all prohibitions and quantitative restrictions on exports but leaves the possibility to institute or maintain export taxes and duties regardless of their rationale.¹⁴

¹³ It has to be noted that, in addition to the challenges specifically regarding certain export duties maintained by China, the Panel was requested to make findings on a wider set of allegations, encompassing the use of export quotas and various other measures relating to the administration of export quotas, the allocation of export quotas, and the publication of export quota amounts, as well as export licensing requirements, minimum export price requirements, and fees and formalities. However, this article will focus on the approach adopted in *China – Raw Materials* with regards to China's commitments on export duties, for the reasoning developed by the Panel and the Appellate Body in this respect has relevant implications for the applicability of Art. XX of the GATT 1994.

¹⁴ According to Art. XI:I of the GATT 1994, 'No prohibitions or restrictions *other than duties, taxes or other charges*, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product or the

Against this general framework, some newly acceding WTO Members have agreed to abide by country-specific obligations on the use of export duties that do not otherwise exist for original WTO Members on the basis of GATT within the context of their accession negotiations.¹⁵ Among them, China has undertaken a stringent regime on export duties by terms of paragraph 11.3 of China's Accession Protocol and the related provisions of the Working Party Report. This provision severely limits the possibility for China to apply export restrictions, and has also been interpreted by the WTO dispute settlement bodies as to pre-empt China from resorting to GATT Article XX defences for violations of the obligations therein.

2.1 THE INCONSISTENCY OF CHINA'S EXPORT DUTIES ON VARIOUS FORMS OF RAW MATERIALS WITH PARAGRAPH 11.3 OF CHINA'S ACCESSION PROTOCOL

China's obligation to eliminate export duties arises exclusively from paragraph 11.3 of China's Accession Protocol and the related provisions of the Working Party Report.¹⁶ Under paragraph 11.3 of China's Accession Protocol, China has agreed upon a general obligation to eliminate all taxes and charges applied to exports, unless the restrictions in question are applied in conformity with Article VIII of the GATT 1994¹⁷ or to the eighty-four products listed in Annex 6 of the Accession Protocol.¹⁸ According to the Note to Annex 6, the applied export duty on listed products may be increased insofar as it does not exceed the maximum rate indicated for each product in the Annex when 'exceptional circumstances' occur and only after consultation with the affected parties.¹⁹

Accordingly, in *China – Raw Materials* the European Union, the United States and Mexico challenged the duties that China maintained on various forms of

territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party' (emphasis added).

¹⁵ For an overview of the WTO-plus commitments on export duties of new members and a critical discussion of their general implications in the light of the approach developed in *China – Raw Materials* with regards to the availability of Art. XX defences, see *infra*, at sec. 3.3.

¹⁶ For the identification of the relevant provisions of the Working Party Report see *infra* nn. 37 and 43.

¹⁷ Article VIII allows WTO Members to impose, at the border, a wide range of fees or charges insofar as they are limited in amount to the approximate costs of services rendered and that they are imposed on or in connection with importation or exportation.

¹⁸ Paragraph 11.3 of China's Accession Protocol reads: 'China shall eliminate all taxes and charges applied to exports unless specifically provided for Annex 6 of this Protocol or applied in conformity with the provisions of Art. VIII of the GATT 1994'.

¹⁹ Annex 6 to China's Accession Protocol, entitled 'Products Subject to Export Duty', lists eighty-four different products (each identified by an eight-digit Harmonized System number) for which maximum levels of export duty are provided. According to the Note to Annex 6, 'China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.'

bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc,²⁰ claiming that they constituted a breach of paragraph 11.3 of China's Protocol of Accession.

The Panel and the Appellate Body expressed no doubt on the inconsistency of the challenged measures with paragraph 11.3.²¹ In particular, the AB clarified that the language of paragraph 11.3, read in conjunction with the Annex 6 and the Note to Annex 6 clearly indicates that: (i) China cannot apply export duties on products not listed in Annex 6;²² (ii) the 'exceptional circumstances' provided for in the Note to Annex 6 cannot be invoked to impose export duties on non-listed products;²³ (iii) in the case of the eighty-four listed products, China could increase the applied export duties only up to the maximum rate set out in Annex 6²⁴ by invoking the 'exceptional circumstances' exception provided for in the Note to Annex 6, but only insofar as it fulfils the prior consultation requirement.²⁵

Within such a framework, what becomes critical is whether the challenged measures are maintained on products listed in Annex 6 of China's Accession Protocol or not. In the case at issue, the challenged export duties were applied on products *not* listed in Annex 6, thus producing a violation of paragraph 11.3 of China's Protocol of Accession.²⁶ The only exception was represented by the 'special' export duty of 50% applied on yellow phosphorus in addition to the

²⁰ The specific forms of the raw materials subject to the complainants' claims can be found at para. 2.2 of the Panel Report.

²¹ Panel Report, para. 7.105. The Appellate Body, called by China to reverse the Panel's finding on the non-availability of Art. XX, never questioned the inconsistency of China's measures with para. 11.3, thereby upholding the Panel's conclusion.

²² According to the Appellate Body, 'Paragraph 11.3 requires China to eliminate taxes and charges applied to exports unless such taxes and charges are "*specifically provided for in Annex 6*" of China's Accession Protocol'. Appellate Body Report, para. 284 (emphasis added).

²³ The Appellate Body notes that 'The Note to Annex 6 clarifies that the maximum rates set out in Annex 6 "will not be exceeded" and that China will "not increase the presently applied rates except under exceptional circumstances"'. The Note therefore indicates that China may increase the "presently applied rates" *on the 84 products listed in Annex 6* to level that remain within the maximum levels listed in the Annex'. Appellate Body Report, para. 284 (emphasis added).

²⁴ See Appellate Body Report, para. 285. This is because the word 'furthermore' in the second sentence of the Note to Annex 6 was interpreted by the Appellate Body as indicating that the obligation contained in the second and third sentence of the Note, i.e., the 'exceptional circumstances' requirement and the consultation requirement, are 'in addition to China's obligation under the first sentence not to exceed the maximum tariff levels provided for in Annex 6'. Appellate Body Report, para. 287.

²⁵ With regard to the obligation of prior consultation with the affected Members, it should be noted that the Appellate Body reversed the Panel's finding that 'China acted inconsistently with its obligations under Annex 6 because it failed to consult with other affected WTO Members prior to imposing export duties on the raw materials at issue' (Panel Report, para. 7.104). The Appellate Body found that, since the raw materials at issue were not included in Annex 6, 'the consultation requirements contained in the Note to Annex 6 are not applicable'. Appellate Body Report, para. 287.

²⁶ The Appellate Body clarified that challenged export duties regulated under para. 11.3 of China's Accession Protocol do not fall within the scope of Art. VIII. Appellate Body Report, para. 290.

‘regular’ export duty of 20% provided for in Annex 6 but, regrettably, the Panel made no findings with respect to the measure at issue because it considered it fell outside of its terms of reference.²⁷

2.2 THE NON-AVAILABILITY OF ARTICLE XX GATT FOR VIOLATIONS OF CHINA’S WTO-PLUS OBLIGATIONS ON EXPORT DUTIES

China did not contest that the challenged export duties resulted in a breach of paragraph 11.3, but invoked the ‘environmental’ defences provided for in Article XX (b) and (g) of the GATT 1994²⁸ to justify them, arguing that paragraph 11.3 and the related provisions of the Working Party Report and the reference to ‘exceptional circumstances’ in Annex 6 would support its right to resort to GATT Article XX.²⁹ The complainants, however, maintained that China was to be *a priori* precluded from invoking Article XX for violations of paragraph 11.3.³⁰

Hence, a key issue addressed in *China – Raw Materials* concerned the availability of the defences provided for in Article XX of the GATT 1994 for violations of China’s WTO-plus commitments on export duties as identified in paragraph 11.3 of China’s Protocol of Accession and the related provisions of the Working Party Report. Following a ‘standard’ interpretative methodology based on the customary rules of interpretation of international law,³¹ the Panel and the

²⁷ See Panel Report, paras. 7.69–7.71.

²⁸ Article XX (b) of the GATT 1994 permits WTO Members to resort to otherwise GATT-inconsistent measures when ‘necessary to protect human, animal or plant life or health’; Art. XX(g) allows WTO Members to adopt measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’ even if they may result in violations of GATT provisions. Measures falling within the scope of either exception have also to comply with the requirements established in the chapeau of Art. XX, i.e., they cannot be ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’. For a critical discussion on the implications of the particular ‘force’ of the exceptions invoked, see *infra*, at sec. 4.3. China invoked Art. XX (b) to justify a temporary export duty on various forms of coke, magnesium, manganese, and Art. XX (g) to defend a temporary export duty imposed to various forms of fluorspar. Panel Report, para. 7.237 and related chart. However, China did not seek to justify export duties imposed on bauxite, manganese ores and concentrates and silicon metal under any of these general exceptions. Panel Report, para. 7.227.

²⁹ Panel Report, para. 7.110.

³⁰ Panel Report, para. 7.108.

³¹ According to Art. 3.2 of the DSU, the dispute settlement system serves ‘... to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’. The dispute settlement bodies have thus traditionally applied the general rule of interpretation as codified by Articles 31 and 32 of the Vienna Convention on the Law of Treaties [done at Vienna, May 23, 1969, 1155 UNTS 33; 8 ILM 679]. The Appellate Body clarified such methodology in *US – Shrimp*: ‘A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as

Appellate Body both considered that a textual interpretation of paragraph 11.3, read in the context provided by the relevant provisions of China's Working Party Report,³² permits to conclude that there is no legal basis for China to invoke the Article XX exceptions to justify export duties found to be inconsistent with paragraph 11.3 of China's Accession Protocol.³³

The Panel and the Appellate Body reached this conclusion by noting, first, that the language found in paragraph 11.3 of China's Accession Protocol expressly includes, on the one hand, Article VIII of the GATT 1994 but, on the other, leaves out reference to any other specific provisions of the GATT 1994 available as exceptions such as Article XX,³⁴ as well as any general references to the WTO Agreement that could be interpreted as indicating that paragraph 11.3 incorporates the flexibilities of GATT Article XX, in contrast to other Paragraphs of China's Accession Protocol.³⁵ Then, they found support for this interpretation in the context provided by the other sub-paragraphs of paragraph 11 – which both include the phrase 'in conformity with the GATT 1994'³⁶ – and by the relevant provisions of the Working Party Report, which analogously prohibit the use of export duties providing for the same set of *specific* exceptions – those covered in Annex 6 and in GATT Article VIII – without incorporating any GATT 1994 flexibilities.³⁷

a whole may usefully be sought'. Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products (Oct. 12, 1998), WT/DS58/AB/R, para. 114.

³² According to the Panel, the provisions of the Working Party Report contribute to 'shed light on the interpretation to be given to related provisions of the Working Party Report or China's Accession Protocol'. Panel Report, para. 7.144.

³³ Panel Report, para. 7.160; Appellate Body Report, para. 307.

³⁴ Panel Report, paras. 7.126–9. Appellate Body Report, para. 291. Moreover, the Appellate Body clarified that the reference to Art. VIII in para. 11.3 of China's Accession Protocol cannot be interpreted, as China had claimed (see China's appellant's submission, para. 225), to confirm the availability of Art. XX of the GATT 1994 in that the matter governed by the two provisions are different. See *supra* n. 26. According to the AB, in fact, 'the fact that Article XX may be invoked to justify those fees and charges regulated under Article VIII does not mean that it can also be invoked to justify export duties, which are not regulated under Article VIII'. Appellate Body Report, para. 290.

³⁵ Panel Report, para. 7.124 and Appellate body Report, para. 304. The reference is to para. 5.1 of China's Accession Protocol whose language had been considered by the Appellate Body to allow China to resort to Art. XX in *China – Audiovisuals*. See *infra*, at sec. 3.1.

³⁶ Panel Report, paras. 7.136–8 and Appellate Body Report, para. 293.

³⁷ Both the Panel and the Appellate Body identified paras. 155 and 156 of China's Working Party Report as the relevant context for para. 11.3 of the Accession Protocol in contrast with China, which had insisted on the relevance of para. 170. According to China, the latter had to be regarded as the relevant context for para. 11.3 for it had the same heading ('Taxes and Charges Levied on Import and Exports') and read: 'Upon Accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Arts. I, III:2 and 4, and XI:1 of the GATT 1994 ...' – thus incorporating a general reference to the WTO Agreement. However, the Panel and the Appellate Body considered that para. 170, inserted in sec. D of the Working Party Report dealing with 'Internal Policies Affecting Foreign Trade in Goods', referred to *domestic* charges and taxes levied on imports *and* exports, and thus merely repeated the commitments existing under certain

Hence, they concluded that:

the *deliberate choice of language* providing for exceptions in Paragraph 11.3, together with the *omission of general references* to the WTO Agreement or to the GATT 1994, suggest that the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defences set out in Article XX of the GATT 1994.³⁸

Nor, being the challenged measures applied on non-listed products, the reference to the ‘exceptional circumstances’ in Note to Annex 6 could play any role in supporting China’s right to invoke the defences of Article XX.³⁹

3 THE ‘SYSTEMIC’ RELATIONSHIP BETWEEN GATT 1994 AND DIFFERENT INSTRUMENTS OF THE WTO AGREEMENT

The conclusion reached on the non-availability of Article XX defences for violation of paragraph 11.3 permitted to shed light on some unexplored provisions of China’s Accession Protocol and the related Working Party Report with regards to China’s unique obligations on the elimination of export duties. However, its importance goes beyond that, for the decision on the non-availability of Article XX does not arise out of an *ad hoc* reasoning developed with respect to paragraph 11.3 only, but directly stems from a more general framework of reference on the relationship between the GATT 1994 and the different instruments of the WTO Agreement. The dispute settlement bodies made in fact clear that access to GATT Article XX defences for violations of obligations falling outside the scope of the GATT 1994 is conditioned to the incorporation therein of language to that effect.

Such conclusion carries important implications for newly acceding members which have agreed to abide by WTO-plus obligations by terms of their accession protocols. Among them, China seems to have accepted a particularly severe regime, although other countries have also agreed upon additional substantive obligations. While the analysis of the implications of the approach developed in *China – Raw Materials* with regards to the whole body of WTO-plus obligations is

GATT rules; on the contrary, paras. 155 and 156 of the Working Party Report, which fall under section C ‘Export Regulations’ and deal solely with the commitment undertaken by China with respect to the elimination of export duties, constitute the relevant context for para. 11.3 of the Accession Protocol, which specifically deals with the prohibition on the use of export duties that does not otherwise exist in the GATT 1994. Paragraph 155 reads: ‘taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol’. Paragraph 156 confirms: ‘China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminium products, were subject to export duties’. Panel Report, paras. 7.130–7.148. See also Appellate Body Report, paras. 294–9.

³⁸ Panel Report, para. 7.129 (emphasis added). The Panel further reiterated: ‘If China and WTO Members wanted the defences of GATT Article XX to be available to violations of China’s export duty commitments, they could have said so in paragraph 11.3 or elsewhere in China’s Accession Protocol’. Para. 7.140. See also Appellate Body Report, para. 293.

³⁹ Appellate Body Report, para. 284.

beyond the scope of this article, this sections will provide with an overview of the implications of such approach for the obligations undertaken by new members on the use of export duties.

3.1 THE LINK BETWEEN ARTICLE XX GATT AND WTO-PLUS PROVISIONS

China – Raw Materials was not the first dispute arisen on the basis of a claim of violation of China's Accession Protocol,⁴⁰ not even with regard to the availability of Article XX as a defence for violations of China's WTO-plus obligations. A similar matter was addressed in *China – Audiovisuals*.⁴¹ In that occasion, the Appellate Body ruled in favour of the applicability of Article XX of GATT 1994 for violations of China's WTO-plus commitment on state trading contained in paragraph 5.1. The AB's conclusion was based on the wording of the introductory clause of paragraph 5.1 – 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement' –, which the Appellate Body interpreted to mean that the defences provided for in Article XX were available, by way of incorporation, for violations of the commitments provided for in that paragraph.⁴² No further consequences were drawn, however, on the more general question of the relationship between the Accession Protocol(s) and the GATT 1994.

In *China – Raw Materials*, the Panel further developed such approach and, by drawing a contrast between paragraph 5.1 and paragraph 11.3 of China's Accession Protocol, clarified that there was no legal basis for applying GATT Article XX with regards to China's WTO-plus commitments on the export duties in that paragraph 11.3 of China's Accession Protocol and related provisions of the Working Party Report⁴³ lack any reference to Article XX of the GATT 1994 as

⁴⁰ Indeed, China-specific provisions have been the matter of contention in various disputes. See, for instance, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339, WT/DS340 and WT/DS341, and WT/DS339/AB/R, WT/DS340/AB/R and WT/DS341/AB/R; and *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363 and WT/DS363/AB/R (both involving China as respondent).

⁴¹ *Ibid.*

⁴² *China – Audiovisuals*, Appellate Body Report, para. 230. It is noteworthy to recall that the AB reversed the Panel interpretation. See Baris Karapinar, *supra* n. 12, at 462.

⁴³ It should be noted that China's insistence upon the relevance of paragraph 170 of Working Party Report as the context for paragraph 11.3 of China's Accession Protocol (see *supra* n. 37) was motivated by the intent to establish that paragraph 170 had to be equated with paragraph 5.1 so as to allow recourse to Art. XX of the GATT 1994. Panel Report, para. 7.138 and Appellate Body Report, para. 291. As known, paragraph 170 reads: 'Upon Accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994 ...'. China maintained that the phrase 'in full conformity with its WTO obligations, including ...' had to be regarded as synonymous with the introductory clause contained in paragraph 5.1 of the

well as any general reference to the flexibilities of the GATT 1994 or the WTO Agreement.⁴⁴ The Appellate Body, confronted with China's request to reverse the Panel's conclusion, confirmed that no legal basis could be found to allow China to resort to Article XX defences failing in paragraph 11.3 any reference to GATT XX, either specifically or by means of a general reference to the GATT 1994 or the WTO Agreement such as in paragraph 5.1.⁴⁵

The importance of the conclusion reached in *China – Raw Materials* lies in the fact that the decision on the non-availability of Article XX is not an automatic reflection of the existence of a WTO-plus obligation as such but of the way a WTO-plus commitment is expressly formulated (i.e., the *language* of paragraph 11.3). In other words, the dispute settlement bodies have made clear that access to the GATT Article XX defences for WTO-plus obligations could be granted only insofar as language to that effect was incorporated therein or elsewhere in the Accession Protocol by way of reference. The reasoning adopted in *China – Raw Materials* is thus formulated in such a way as to be applicable not only to China's WTO-plus commitments on export duties, but also to the additional substantive obligations which other new members may have agreed upon in their accession protocols, not necessarily – and anyways not uniquely – on the use of export duties.

3.2 CONT.: THE LINK BETWEEN ARTICLE XX GATT AND OTHER COMPONENTS OF THE WTO AGREEMENT

The conclusion reached in *China – Raw Materials* did not arise out of an ad hoc reasoning developed with respect to paragraph 11.3 of China's Accession Protocol only, but it directly stemmed from a more comprehensive reasoning which the dispute settlement bodies applied to a WTO-plus obligation such as paragraph 11.3 in the light of the legal status of the accession protocols as integral parts of WTO Agreement.⁴⁶

Accession Protocol in that the term 'including' would have to be interpreted as if the list of provisions was not exhaustive. China argued in fact that 'any flexibilities that paragraph 170 affords to China to adopt otherwise WTO-inconsistent export "taxes" and "charges" must extend equally to paragraph 11.3'. China's appellant submission, para. 246. However, the Panel considered that paragraph 170 could not be equated with paragraph 5.1 and the Appellate Body upheld this conclusion. Panel Report, paras. 7.130–7.148 and Appellate Body Report, para. 291.

⁴⁴ Panel Report, para. 7.147 and Appellate Body Report, para. 304.

⁴⁵ Appellate Body, para. 307.

⁴⁶ As the Panel reiterated, the accession protocols, altogether with the commitments included in the Working Party Report that are incorporated therein by cross-reference, are an integral component of the WTO Agreement. This is also why WTO Members can initiate WTO dispute settlement proceedings on the basis of a claim of violation of China's Accession Protocol. Panel Report, paras. 7.111–5. See, for instance, the language of paragraph 1.2 of China's Accession Protocol and paragraph 342 of the Working Party Report, incorporated into the former.

Indeed, in *China – Raw Materials* the Panel clarified the reach of Article XX of the GATT 1994 and the criteria to determine whether and to what extent Article XX defences can be invoked for violations of obligations falling outside of the GATT 1994. According to the Panel, Article XX defences are by default available only for GATT violations and there is no such ‘umbrella clause’ in the WTO Agreement which would allow WTO Members to resort to Article XX GATT for violations of any provision of the WTO Agreement. The Panel reached this conclusion by observing that ‘each WTO agreement provides for its own set of exceptions or flexibilities applicable to the specific obligations found in each covered agreement’⁴⁷ and that the language of the introductory phrase of Article XX – ‘nothing in this Agreement should be construed to prevent the adoption or enforcement of ...’ – seems to exclude the direct applicability of Article XX to other components of the WTO Agreement.⁴⁸

However, the Panel did not exclude *ab absoluto* that Article XX would not be available for violations of obligations falling outside the scope of the GATT 1994. Rather, noting that WTO Members have, on occasion, incorporated Article XX defences into other instruments of the WTO Agreement by way of reference,⁴⁹ it concluded that access to Article XX GATT can be granted for violations of non-GATT obligations insofar as language to that effect is incorporated therein by cross-reference. In other words, the legal basis for applying GATT Article XX exceptions to obligations arising out of other components of the WTO Agreement is, as reiterated by the Appellate Body,⁵⁰ the very text of the incorporation.

Hence, the importance of *China – Raw Materials* lies in the fact that the dispute settlement bodies did not just rule on the non-availability of Article XX exceptions for violations of paragraph 11.3 of China’s Accession Protocol on the basis of its specific wording, but framed this decision within a more general, ‘systemic’ approach to the applicability of Article XX GATT. This approach not only shed light on the relationship between GATT 1994 and the additional obligations contained in the accession protocols, but contributed to clarify, more generally, the relationship between Article XX GATT and other WTO obligations arising from different instruments of the WTO Agreement. According to this framework, China’s commitment under paragraph 11.3 is regarded as a WTO obligation falling outside the scope of the GATT 1994, the violation of which could only be justified insofar as language to that effect was incorporated therein.

⁴⁷ Panel Report, para. 7.150.

⁴⁸ According to the Panel, ‘*A priori*, the reference to *this* Agreement suggests that the exceptions therein relate only to GATT 1994, and not to other provisions’. Panel Report, para. 7.153.

⁴⁹ See, e.g., the TRIMs Agreement, whose Art. 3 states: ‘All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement’. Panel Report, para. 7.153.

⁵⁰ Appellate Body Report, para. 303.

3.3 THE RARE EARTHS DISPUTE AND BEYOND: GENERAL IMPLICATIONS FOR CHINA AND OTHER WTO MEMBERS ASSUMING WTO-PLUS OBLIGATIONS ON EXPORT DUTIES

On the basis of the approach followed in *China – Raw Materials*, China's margin of manoeuvre to institute export duties appears severely limited. The interpretation of paragraph 11.3 of China's Accession Protocol given by the Panel and the Appellate Body has, in particular, relevant implications for the new dispute on rare earths. The export duties challenged by the European Union, the United States and Japan under paragraph 11.3 are in fact imposed on materials not listed in Annex 6 of China's Accession Protocol with the only exception of certain forms of tungsten.⁵¹ China's export duties on rare earths and molybdenum are thus to be presumed in breach of paragraph 11.3. In the case of the export duty applied on tungsten, China could in principle invoke the occurrence of the 'exceptional circumstances' mentioned in the Note to Annex 6 as long as it is not in excess of the maximum rate of 20% provided for in Annex 6. Such scenario would prove very interesting in that it would allow for clarification of the scope of this exception.⁵² Indeed, whereas the AB clarified in *China – Raw Materials* that China could not invoke the Article XX defences to justify export duties on listed products in excess of the maximum levels set-forth in Annex 6,⁵³ it did not, specify whether and, if so, to what extent, the scope of the 'exceptional circumstances' requirement for listed products which are not in excess of the maximum Annex 6 levels may be considered to overlap with the scope of Article XX of the GATT 1994, as China argued.⁵⁴ In any case, however, chances that China may be successful in invoking the 'exceptional circumstances' justification are almost null since it reportedly did not fulfil the additional prior consultation requirement set out in the Note to Annex 6.⁵⁵

China's export duties on rare earths, tungsten and molybdenum are thus very likely to be found in breach of paragraph 11.3 of China's Accession Protocol, regardless of the proclaimed environmental protection and conservation rationale to which China has continuously referred to, making explicit reference to Article

⁵¹ See the list of the challenged items, identified by the HS number, in the request for the establishment of the Panel in WT/DS431/6, WT/DS432/6 and WT/DS433/6.

⁵² We recall that, in *China – Raw Materials*, the 'exceptional circumstances' venue could have applied solely with regards to the special duty on yellow phosphorus. However, this option remained unexplored for the Panel made no findings on the measure at issue on the basis of the terms of reference argument. See *supra* n. 27 and the corresponding text.

⁵³ Appellate Body Report, para. 284.

⁵⁴ See Appellate Body Report, para. 282.

⁵⁵ The export duties imposed on rare earths, tungsten and molybdenum have raised great concern precisely because they were adopted unilaterally by China without any form of prior consultation. See Bin Gu, *Mineral Export Restraints and Sustainable Development*, 14 J. Int'l Econ. Law 765 (2011), at 771-773.

XX b) and g) of the GATT 1994.⁵⁶ This venue is in fact *a priori* precluded in the light of the approach developed in *China – Raw Materials* with regards to the applicability of Article XX GATT.

China is not the only new Member to have agreed upon additional obligations concerning the elimination of export duties. However, the severity of the commitments undertaken in this regard varies greatly among countries. The great majority of the accession protocols simply include a standard formula according to which, from the date of accession, the country would apply its laws and regulations governing export measures ‘in conformity with the relevant provisions of the WTO’.⁵⁷ In the light of the approach adopted in *China – Raw Materials*, the language of this formula – which frequently includes express reference to, *inter alia*, Article XX of the GATT 1994 – seems to leave to the new members a significant margin of manoeuvre in the use of export duties, comparable to that of the original WTO Members.

In contrast to this general trend, three countries among the twenty-nine new members appear to have undertaken, along with China, stringent commitments on the use of export duties assuming detailed obligations to bind, phase down and/or eliminate the export duties maintained on particular products within a certain timeframe: Mongolia, Ukraine, and Russia.⁵⁸ Significantly, however, Mongolia has undertaken to eliminate solely the export duties imposed on raw cashmere which, according to Mongolia itself, was maintained with the only intent to promote downstream processing in the textile sector.⁵⁹ This WTO-plus obligations is thus quite narrow in scope and does not ‘deprive’ Mongolia from resorting to measures aimed at addressing the legitimate non-economic goals recognized in Article XX GATT, while leaving Mongolia free to recur to export duties with regards to any other product regardless of the rationale.

Ukraine and the Russian Federation, on the contrary, have abided by additional obligations which limit the use of export duties on a wide range of products. In contrast with China, however, they appear to have successfully negotiated some form of flexibilities apt to allow resort to GATT Article XX. In the former case, an express reference to Article XX exceptions was incorporated into the paragraph of the Working Party Report by terms of which Ukraine agreed not to increase the export duties applied to a specific set of products nor to

⁵⁶ See, for all, the Comments by Head of MOFCOM Department of Treaty and Law on US, EU and Japan Requests of Consultations on China, May 15, 2012 (<http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201203/20120308016675.html>).

⁵⁷ For a more detailed description of the section on ‘Export regulations’ generally contained in the accession protocols, see Baris Karapinar, *supra* n. 12, at 458–459.

⁵⁸ *Ibid.*

⁵⁹ See Mongolia, Accession Working Party Report, WT/ACC/MNG/9, June 27, 1996, under the heading ‘Export Measures’, at 12.

apply other measures having an equivalent effect.⁶⁰ In the latter case, Russia's commitment to bind the export duties on approximately 700 tariff lines is accompanied by a general reference to the WTO Agreement similar in language with that of paragraph 5.1 of China's Accession Protocol.⁶¹ In this respect, China appears to be the only country to have agreed upon a particularly stringent regime on the use of export duties which, on the basis of the approach adopted in *China – Raw Materials*, pre-empts it from invoking Article XX defences.

4 ASSESSING THE APPROPRIATENESS OF THE *CHINA – RAW MATERIALS* APPROACH TO ARTICLE XX GATT: SHOULD ENVIRONMENTAL CONCERNS CHANGE THE PICTURE?

Under the approach delineated by the dispute settlement bodies in *China – Raw Materials*, a Member may be entitled to resort to the defences provided for in Article XX only for violations of the GATT 1994 provisions or when Article XX justification has been incorporated by way of reference into the relevant part of another WTO agreement. According to such approach, China is left with no margin of manoeuvre to institute export duties on products non-listed in Annex 6, regardless of the rationale such measures may respond to. In the case at issue, as well as in the new dispute of rare earths, China invoked in particular the 'environmental' defences provided for in Article XX b) and g) of the GATT 1994. This section aims at investigating whether alternative venues could have been explored by the Panel and the Appellate Body as to rule in favour of the availability of Article XX exceptions for violations of provisions, such as paragraph 11.3 of China's Accession Protocol, falling outside the scope of the GATT 1994,

⁶⁰ Paragraph 240 of Ukraine's Accession Working Party Report (WT/ACC/UKR/152) reads: 'The representative of Ukraine confirmed that at present export duties were applied only to the goods listed in Table 20(a). He further confirmed that Ukraine would reduce export duties in accordance with the binding schedule contained in Table 20(b). He also confirmed that as regards these products, Ukraine would not increase export duties, nor apply other measures having an equivalent effect, *unless justified under the exceptions of the GATT 1994*' (emphasis added).

⁶¹ According to para. 638 of Russia's Accession Working Party Report (WT/ACC/RUS/70): '... from the date of accession,...products described in Part V of [the Schedule of Concessions and Commitments on Goods of the Russian Federation] would, subject to the terms, conditions or qualifications set-forth in that Part of the Schedule, be exempt from export duties in excess of those set-forth and provided therein. The representative of the Russian Federation further confirmed that the Russian Federation would not apply other measures having an equivalent effect to export duties on those products. He confirmed that, from the date of accession, the Russian Federation would apply export duties *in conformity with the WTO Agreement*, in particular with Article I of the GATT 1994 . . . The representative of the Russian Federation confirmed that the Russian Federation would, from the date of accession to the WTO, administer export tariff-rate quotas (TRQs) *in a manner that is consistent with the WTO Agreement and in particular the GATT 1994* and the WTO Agreement on Import Licensing Procedures' (emphasis added).

and, in particular, whether a different result could be achieved in the light of the fundamental non-trade concerns invoked.

4.1 AN AD HOC SOLUTION: A RESTRICTIVE INTERPRETATION OF WTO-PLUS OBLIGATIONS

It has been suggested that an alternative solution could have been reached had the dispute settlement bodies mitigated the traditional 'textualistic' approach by adopting a more openly purposive interpretative methodology. The decision on the non-availability of Article XX defences for violations of paragraph 11.3 of China's Accession Protocol, as mentioned, was rooted on the specific wording of the provision at issue, read in its context.⁶² The appropriateness of this methodology – which the Appellate Body had adopted with regards to *China – Audiovisuals* as well – has been subject to increased controversy with regards to disputes related to the specific nature and scope of Member-specific obligations,⁶³ with particular regards to China's unique WTO-plus obligations.⁶⁴

In the case of China's unique commitments, the 'textualistic' approach has been criticized to 'read China-specific obligations in clinical isolation with generally applicable rules',⁶⁵ relying solely on the text and context of the provisions at issue while leaving aside any consideration in the light of the object and purpose of the provisions at issue or the covered agreements as a whole. This

⁶² See *supra* n. 31.

⁶³ A growing chorus of critics has arisen denouncing the alleged inequity resulting from the heterogeneous structure of the WTO membership, encompassing original Members and the acceding Members. See, e.g., Xiaohui Wu, Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/AB/R), 9 Chinese JIL 423 (2010), 423–432; Jose F. De Medeiros, *Global Trade Law – China's Export Restraints Found To Be Inconsistent With Its Obligations As A Member Of The World Trade Organization – China – Measures Related To The Exportation Of Various Raw Materials*, 35 Suffolk Transnat'l L. Rev. 203 at 203–219 (2012).

⁶⁴ Some authors have pointed out that 'China-specific commitments (i.e., accession terms that apply to China alone) are unprecedented in the history of the WTO and are unparalleled by those undertaken by any other acceding WTO member'. Xiaohui Wu, *No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization*, 10 Chinese J. Int'l L. 227, 260 at 239 (2011). According to Nicholas Lardy, the accession terms negotiated by China are 'so onerous that they violate the fundamental principles of the WTO', such as reciprocity and non-discrimination. See Nicholas Lardy, *Integrating China into the Global Economy* 9 (Brookings Institution Press 2002). The 'special' terms of accession of China are the result of a controversial fifteen-year long process of negotiation that required China to commit to a unique set of additional concessions in order to overcome WTO Members' concerns over China's economic size and competitiveness and their reluctance to admit into the system the largest trading nation with a transition economy and socialist form of government. See Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 Am. U. ILR 1469–1538 (2000).

⁶⁵ Xiaohui Wu, *No Longer Outside*, *supra* n. 64, at 260.

‘void’ in the interpretation would ultimately risk jeopardizing the underlying object and purpose of the WTO Agreement as a whole.⁶⁶

Some authors have thus called for an interpretative approach based on a restrictive interpretation of China-specific obligations,⁶⁷ according to which, in case of doubt,⁶⁸ China’s limitations of sovereignty would have to be interpreted narrowly in the light of the overall object and purpose of the WTO Agreement, in order to preserve ‘the coherence and the integrity of the WTO legal system and its fundamental principles’.⁶⁹ In this perspective, China’s WTO-plus obligations could not be interpreted to prevent China from resorting to Article XX defences.

Although the Appellate Body has adopted this approach at least once in the *EC – Hormones* case,⁷⁰ a major limit is that the principle of *in dubio mitius* is a supplementary means of interpretation to which, according to customary rules of interpretation as reflected in Article 32 of the Vienna Convention, the dispute settlement bodies should refer to only on a subordinate basis, i.e., in cases when the application of the general rule established in Article 31 leaves the meaning ‘ambiguous or obscure’ or ‘manifestly absurd or unreasonable’.⁷¹ However, the dispute settlement bodies did not find the language of paragraph 11.3 equivocal or inconclusive.⁷² They neither found this interpretation unreasonable, provided that it proved consistent with their interpretation of the relationship between

⁶⁶ *Ibid.* It has been suggested that the reluctance of the Appellate Body to embrace any forms of purposive interpretation ‘may have to do with the attitude of a young institution which must establish its authority and with the reciprocal nature of the undertakings’. George Nolte, *The Law beyond the Vienna Convention* 143 (Enzo Cannizzaro eds., Oxford University Press 2011).

⁶⁷ The principle of restrictive interpretation (*in dubio mitius*) is a generally recognized supplementary means of interpretation in international law which applies in deference to the sovereignty of States in the sense that ‘[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties’. Robert Jennings & Arthur Watts, *Oppenheim’s International Law* vol. I, at 1278 (Pearson Higher Education 1992).

⁶⁸ According to this reasoning, the object and purpose of the WTO-plus provisions, at least in the case of China, are unknown or questionable. Indeed, it has been noted that ‘[t]hroughout the hundreds of pages of the Protocol and the Working Party Report there is not a single passage setting forth the rationale or the object and purpose of such differential treatment of China’. See Julia Ya Qin, *supra* n. 7, at 510.

⁶⁹ Xiaohui Wu, *supra* n. 64, at 260.

⁷⁰ In *EC – Hormones*, the Appellate Body stated: ‘We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation . . . language far more specific and compelling . . . would be necessary’. See Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products* (Jan. 16, 1998), WT/DS26/AB/R, WT/DS48/AB/R, at 165. Recourse to restrictive interpretation has not, however, been applied consistently by the Appellate Body. See Xiaohui Wu, *supra* n. 64, at 148.

⁷¹ For a thorough discussion on the hierarchical relationship between Arts. 31 and 32 of the Vienna Convention and its character of general international law see Luigi Sbolci, *The Law beyond the Vienna Convention* (Enzo Cannizzaro eds., Oxford University Press 2011), at 145 et seq.

⁷² Indeed, in *China – Raw Materials* the Panel pointed out that the language of paragraph 11.3 ‘can only be understood to reflect agreement at the time of China’s accession that since China’s export duties

Article XX of the GATT 1994 and the other components of the WTO Agreement, according to which Members would be entitled to resort to the defences provided for in Article XX only for violations of the GATT 1994 provisions or when Article XX justification is incorporated by way of reference into the relevant part of another WTO agreement.⁷³ Within such a framework, little scope was left to the dispute settlement bodies to apply the restrictive principle in favour of China's sovereignty.⁷⁴ Moreover, the appropriateness of this approach seems affected by its *ad hoc* basis. China is in fact, as previously noted, the only WTO Member that has agreed upon WTO obligations on the use of export duties formulated in a way which, on the basis of the reasoning adopted in *China – Raw Materials*, pre-empts recourse to Article XX exceptions. Such circumstance, on the one hand, reinforces the 'reasonableness' of the decision on the non-availability with respect to violations of paragraph 11.3 reached in *China – Raw Materials*; on the other, it shows that the *in dubio mitius* approach would then serve the sole purpose to relieve China from the impossibility to invoke Article XX defences for violations of paragraph 11.3 rather than to offer a legally sound framework of reference to guide the interpretation of WTO-plus obligations, which is indeed the underlying goal of the comprehensive approach developed in *China – Raw Materials*. Finally, the *in dubio mitius* approach seems in contrast with the vision adopted in *China – Raw Materials* with regards to the implications of the inherent right to regulate trade, according to which to allow for the availability of Article XX when such a justification is not provided for as a result of the negotiation of China's terms of accession would 'undermine the predictability and legal security of the international trading system'.⁷⁵

4.2 THE INHERENT AND SOVEREIGN RIGHT TO REGULATE TRADE

The Panel and the Appellate Body denied in *China – Raw Materials* that the availability of Article XX defences for violations of non-GATT obligations not incorporating any GATT 1994 flexibilities, such as paragraph 11.3 of China's Accession Protocol, could be inferred from the WTO Members' inherent and sovereign right to regulate trade as affirmed in the WTO Agreement 'read as a whole'.⁷⁶

commitments arose exclusively from China's Accession Protocol, Article XX would not apply to such commitment'. Panel Report, para. 7.138 (emphasis added). See also Appellate Body Report, para. 306.

⁷³ Panel Report, paras. 7.153–4 and Appellate Body Report, para. 306.

⁷⁴ See *infra*, at sec. 4.2. It should also be noted that the Appellate Body did attempt to inform its conclusion in the light of the underlying purpose of the WTO Agreement as a whole, by reference to the legitimate goals proclaimed in the preamble. See *infra*, at sec. 4.3.

⁷⁵ Panel Report, para. 7.159. See *infra*, at sec. 4.2.

⁷⁶ Paragraph 7.155.

China had maintained that the specific obligations accepted with regards to export duties could not pre-empt it to exercise its right to regulate trade at least with respect to the circumstances provided for in Article XX of GATT 1994.⁷⁷ In claiming so, it referred to *China – Audiovisuals*, where the Appellate Body admitted that such right has an inherent character rather than being ‘bestowed by international treaties such as the WTO Agreement’.⁷⁸

However, the Panel clarified that the inherent right to regulate trade cannot prevail over WTO rules intended to constrain the exercise of that right, for China deliberately agreed upon those rules as an ‘ultimate expression of ...sovereignty’.⁷⁹ The Appellate Body further reiterated that in *China – Audiovisuals* the availability of the Article XX exceptions did not arise out of the recognizance that China’s inherent right to regulate trade was to prevail over the commitments agreed upon in the Accession Protocol but was a direct consequence of the specific wording of paragraph 5.1, which expressly incorporates reference to the WTO Agreement.⁸⁰ Hence, the AB confirmed that the legal basis for applying Article XX of the GATT 1994 to non-GATT obligations such as WTO-plus commitments is the text incorporation by cross-reference and clarified that the inherent right to regulate trade plays a role in *this* respect.

In rejecting China’s sovereignty arguments with respect to the availability of Article XX defences, the Panel recognized that ‘the situation created by [paragraph 11.3] *taken in isolation* may be perceived as imbalanced’.⁸¹ However, the Panel recalled that, in accordance with Article XII of the Marrakesh Agreement,⁸² ‘the negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the

⁷⁷ Panel Report, para. 7.155. In the concluding statement given at the first substantive meeting, China asserted: ‘China finds repugnant the argument that it has not only assumed uniquely onerous obligations, but also that it is denied its “inherent power” to take measures in relation to these uniquely onerous obligations to promote other fundamental interests, such as conservation and public health. If this argument were accepted, China would be subject to uniquely onerous obligations and would be deprived, again uniquely, of its “inherent power” to regulate trade’. Executive Summary of the Opening Oral Statement by China at the First Substantive Meeting, *China – Raw Materials*, WT/DS398/R/Add.1 (July 5, 2011), Annex D-2, para. 24.

⁷⁸ *China – Audiovisuals*, Appellate Body Report, para. 222.

⁷⁹ Panel Report, para. 7.157. Moreover, the Panel considered that ‘[t]his view is reinforced by the fact that China and the WTO Members did make explicit reference to exceptions when they intended to incorporate them’. Para. 7.147.

⁸⁰ Appellate Body Report, para. 300.

⁸¹ Panel Report, para. 7.160 (emphasis added).

⁸² According to Art. XII of the Marrakesh Agreement, ‘[a]ny State may accede to this Agreement, *on terms to be agreed between it and the WTO*’ (emphasis added).

specific wording of each commitment set out in these documents.’⁸³ Accordingly, it concluded that:

[t]o allow such exceptions to justify a violation when no exception was apparently envisaged or provided for would change the content and alter the careful balance achieved in the negotiation, ultimately undermining the *predictability and legal security* of the international trading system.⁸⁴

The vision promoted by the Panel is, on a general basis, appreciable in that it reconciles the disproportionality of China’s unique commitments on the use of export duties with the multilateral nature of China’s accession package. In other words, although paragraph 11.3 may in itself produce an imbalanced outcome, it is but one obligation within the overall set of concessions that form the multilaterally agreed package of China’s accession. In this perspective, the Panel’s approach leaves little scope to justify a recourse to a restrictive interpretation of China’s specific obligations on the elimination of export duties: according to this general framework, in fact, China exercised its inherent and sovereign right to regulate trade in negotiating the language of paragraph 11.3 in a way which prevents it from resorting to Article XX as part of a mutually advantageous comprehensive package which globally satisfied both China and the WTO membership.⁸⁵ Such conclusion, moreover, seems to find support in a comparison of the language of paragraph 11.3 with the terms of accession agreed upon by the other new members that undertook additional specific obligations on the use of export duties.⁸⁶ However, as I will argue below, this solution configures a ‘rigid’ approach that fails to take into adequate consideration the particular relevance of the fundamental interests invoked by China in the case at issue, i.e., the public health and conservation goals recognized in Article b) and g) of the GATT 1994.

4.3 THE RIGHTS TO REGULATE TRADE TO ADDRESS FUNDAMENTAL ENVIRONMENTAL CONCERNS

As known, in *China – Raw Materials* China invoked the ‘environmental’ defences provided for in Article b) and g) of the GATT 1994. In particular, China argued during the appeal phase that its entitlement to recur to Article XX of the GATT 1994 for violations of paragraph 11.3, although not inferable from its specific language on the basis of the Panel’s approach, was founded on its right to regulate

⁸³ Panel Report, para. 7.112. The Panel further underlined that ‘[u]ltimately, the acceding Member and the WTO Membership recognize that the intensively negotiated content of an accession package in an “entry fee” to the WTO system’. *Ibid.* (emphasis added).

⁸⁴ Panel Report, para. 7.159 (emphasis added).

⁸⁵ Panel Report, para. 7.129.

⁸⁶ See *supra* nn. 62 to 64 and corresponding text, at sec. 3.3.

trade ‘in a manner that promotes conservation and public health’.⁸⁷ In other words, China tried to strengthen the inherent and sovereign right to regulate argument by making specific reference to the fundamental nature of the non-trade interests protected under Article XX b) and g)⁸⁸ which, in addition to being incorporated into other covered agreements containing an article that reproduces the disciplines set out in Article XX GATT or refers to it, are also recognized in the first recital of the preamble of the WTO Agreement as well as in the preamble of many covered agreements.⁸⁹

Interestingly, the Appellate Body did recognize that the proclaimed rationales were legitimate non-trade goals falling within the scope of the underlying objectives of WTO as stated in the preamble of the WTO Agreement,⁹⁰ but denied that the preamble could be interpreted as to provide a legal basis for invoking Article XX defences for violations of a non-GATT provision, such as paragraph 11.3, that does not incorporate any reference to Article XX flexibilities. In the Appellate Body’s view, in fact, the language of the preamble does not ‘provid[e] specific guidance on the question of whether Article XX of the GATT 1994 is applicable to paragraph 11.3 of China’s Protocol of Accession’⁹¹ but rather indicates that ‘the *WTO Agreement*, as a whole, ...reflect[s] the balance struck by WTO Members between trade and non-trade concerns’.⁹² Hence, the Appellate Body upheld the vision expressed by the Panel on the limited effects ascribable to the inherent right to regulate trade with respect to the applicability of Article XX GATT, notwithstanding the fundamental relevance of the environmental interests invoked by China in the case at issue.

Although the AB’s reasoning is internally coherent with the general approach adopted with regards to the prerequisites for the availability of Article XX GATT,

⁸⁷ Appellate Body Report, para. 300.

⁸⁸ According to China, in particular, ‘the Panel distorted the balance of rights and obligations established in China’s Accession Protocol by assuming that China had “abandoned” its right to impose export duties “to promote fundamental non-trade-related interests, such as conservation and public health”’. Appellate Body Report, para. 305.

⁸⁹ See the texts of the first recital of the preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures, the sixth recital of the preamble of the Agreement on Technical Barriers to Trade, the preamble of the Agreement on Import Licensing Procedures, the fourth recital of the preamble of the General Agreement on Trade in Services, and the preamble and Art. 8.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights. For China’s arguments, see Appellate Body Report, paras. 37 et seq.

⁹⁰ The first recital of the preamble of the Agreement establishing the WTO recognizes that trade relations between Members ‘should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development’ (emphasis added).

⁹¹ Appellate Body Report, para. 306.

⁹² *Ibid.* (original emphasis).

it is regretful that the Appellate Body adopted a 'rigid' approach, losing the occasion to fully explore whether any different solutions, in terms of the applicability of Article XX GATT, could derive from the particular type of exceptions invoked in the light of the underlying purpose of the WTO Agreement as a whole. The AB avoided the issue by stating that the *language* of the preamble could not be interpreted to provide for a legal basis to apply (*generally*) Article XX to non-GATT obligations. However, it failed to consider that the preamble of the WTO Agreement is not a provision of a material agreement to be interpreted literally as including or not including language apt to allow recourse to Article XX to justify the violation of the specific obligation contained therein, but rather defines the general principles upon which the WTO was edified. Hence, the Appellate Body reached a conclusion that fails to attach sufficient significance to the fact that the *specific* exceptions invoked refer to values the WTO Members have agreed to reaffirm in the first recital of the preamble of the WTO Agreement as inspiring the 'mission' of the Organization itself as well as the global architecture of the covered agreements.⁹³

On the basis of the approach embraced by the Appellate Body, a WTO Member would be prevented to adopt an internal measure aimed at addressing fundamental interests such as conservation or public health when this measure would result in a violation of a non-GATT obligation not including an express reference to GATT Article XX. Such situation would produce a *vulnus* in the protection of the values upon which the multilateral trading system was founded, which hardly could be considered 'remedied' by looking at the overall balance of economic concessions that the Member would benefit from as a result of its participation to the system, as the Appellate Body seemed to suggest. Such values, in fact, indisputably lay at the very foundation of the WTO system, and the participation to the multilateral trading system should never imply that a Member has to give up a policy which is primarily and genuinely aimed at addressing the non-trade concerns protected under GATT Article XX b) and g). In this perspective, the Appellate Body could have engaged in a more 'courageous' interpretation so as to identify a limit to the general approach adopted in *China – Raw Materials* when the fundamental interests provided for in Article XX b) and g)

⁹³ The policy objectives protected through Arts. b) and g) of Article XX GATT are in fact not only generally recalled by means of the first recital of the preamble of the WTO Agreement (see *supra* n. 90), but also enshrined in the principle of sustainable development explicitly reaffirmed therein and recognized as one of the cornerstone of the WTO system. For an overview of the progressive openings of the multilateral trading system to 'environmental' concerns through the reference to the principle of sustainable development as stated in the preamble of the WTO Agreement in the relevant WTO case law, see Giorgio Sacerdoti, *La disciplina del commercio internazionale e la protezione dell'ambiente*, in *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente* 63 et seq (FOIS P. ed., Editoriale Scientifica 2007).

are at stake, in the sense to allow for the availability of Article XX b) and/or g) defences for violations of non-GATT obligations even when language to that effect has not been incorporated therein. This solution would not run counter to the view adopted by dispute settlement bodies with regard to the right of every WTO Member to regulate trade, in that both original members and new members assuming additional obligations by terms of their accession protocols voluntarily agreed to become members of WTO, thereby committing to respect the general principles inspiring the mission of the Organization. Moreover, this solution would not have an ad hoc basis in that, apart from the (rather limited) implications with regards to WTO-plus obligations on the specific matter of the use of export duties— which, as already mentioned, represents a major problem for China only⁹⁴ –, it would have a general application with regards to the applicability of Article XX b) and g) to non-GATT obligations. Hence, it would integrate with the general approach adopted in *China – Raw Materials* while providing for an exception to such approach that will ensure the mutual supportiveness between trade and environment measures.

5 CONCLUSION

China – Raw Materials represents a landmark case for the definition of the reach of the WTO discipline on export restraints on the basis of existing GATT provisions and relevant case law, and will most certainly constitute an obliged point of

⁹⁴ It should be noted that, according to China, the applicability of Art. XX for violations of para. 11.3 of the Accession Protocol implies that the ‘exceptional circumstances’ referred to in the Note to Annex 6 could have been invoked both to exceed the maximum rates specified in Annex 6 for the 84 products listed in the Annex, and to impose duties on non-listed products. Appellate Body Report, para. 282. This argument differs from the one proposed in this paper in that China tried to defend the applicability of Art. XX (in general) for violations of para. 11.3 (only) on the basis of the language of the Note to Annex 6, which however explicitly refers to the possibility to increase the applied rates on the exportation of the listed products up to the maximum bound rate indicated in Annex 6. According to the approach suggested here, China could in principle invoke the defences of Art. XX b) and/or g) *only*. This is not to say that such measures would be legitimate under Art. XX b) and/or g). Indeed, the Panel in *China – Raw Materials* examined the Chinese export duties on an *arguendo* basis and concluded that, even if Art. XX were available, they could not be justified under Art. XX b) and g). More generally, the Panel seemed to consider very unlikely that measures such as export duties and export restrictions in general could be found to fall within the scope of the general environmental exceptions: on the one hand, the Panel almost excluded that such measures could be genuinely considered to relate to conservation within the meaning of Art. XX (g) by stating that their very nature is ‘very difficult to reconcile with the goal of conserv[ation]’ (see Panel Report, para. 7.434); on the other, it considered such measures as an inappropriate tool to address environmental externalities in a more effective way compared to other less trade-restrictive available alternatives (see Panel Report, para. 7.590).

reference for the purpose of assessing the consistency of similar measures⁹⁵ at least until a reform of multilateral rules in this respect will be finalized.⁹⁶

The purpose of this article has been to analyse in particular the approach developed by the Appellate Body with regards to the applicability of GATT Article XX. *China – Raw Materials* marks in fact a significant step forward with respect to the previous case *China – Audiovisuals* in that the decision on the non-availability of Article XX exceptions for violations of China's specific commitments on export duties was not merely rooted on the specific wording of paragraph 11.3 of the Accession Protocol, but framed within a more general, 'systemic' approach to the applicability of Article XX GATT. According to this approach, Article XX defences are per se available only for violations of GATT 1994 provisions, whereas the legal basis to resort to such defences for violations of non-GATT obligations is the text of incorporation by cross-reference.

The conclusion reached in *China – Raw Materials* has highly significant implications for China, whose margin of manoeuvre to apply export duties results severely affected by the language of paragraph 11.3 and the lack therein of any reference to the flexibilities of GATT Article XX. In particular, in the light of the approach adopted by the dispute settlement bodies, China seems pre-empted from resorting to Article XX for violations of paragraph 11.3, rendering the outcome of the new dispute on rare earths in this respect rather predictable.⁹⁷

The importance of the approach defined in *China – Raw Materials*, however, goes beyond the immediate implications for China and for other WTO Members assuming stringent additional obligations on the use of export duties – which, as seen, are rather limited – but concerns all WTO-plus obligations agreed upon by new members in their accession protocols as well as, more generally, other WTO

⁹⁵ In particular, such framework is to prove crucial with regards to the new dispute on rare earths involving China (see *supra* at sec. 3.3).

⁹⁶ The strengthening of the discipline on export restrictions has been subject to debate within the Doha Development Agenda and various proposals have been put in the table both during the Agriculture negotiations and the NAMA negotiations. See Baris Karapinar, *supra* n. 12.

⁹⁷ It has to be noted that chances that the dispute settlement bodies would reverse this conclusion are quite modest. As a matter of fact, although the Appellate Body has indicated that panel reports do not constitute subsequent practice for the purposes of Art. 31(3)(b) of the Vienna Convention, the WTO panels are often referred to in successive cases as if they were case law. As the Appellate Body stated in *Japan – Alcoholic Beverages*: 'Adopted panel reports are an important part of the GATT *acquis* ... They create legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute'. See *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, Report of Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 14. Indeed, the complainants' representatives in the new rare earths dispute made clear that the United States, the European Union and Japan expect China's export regime on rare earth elements to be found inconsistent with China's WTO obligations in line with the previous ruling in *China – Raw Materials*. See, for instance, the Statement released by the EU Trade Commissioner Karel De Gucht at the time of the submission of the request for consultation, available at <http://trade.ec.europa.eu/eutn/psendmessage.htm?trandid=6924>.

provisions falling outside the scope of GATT 1994. This approach, in fact, has the merit to clarify the relationship between GATT 1994 and WTO obligations arising from different instruments of the WTO Agreement, such as new members' accession protocols, in the sense of excluding that Article XX GATT may be considered as an 'umbrella clause' of the WTO Agreement available for violations of any WTO provision.

The general applicability of the approach adopted in *China – Raw Materials* is appreciable for it defines a uniform solution to guide the interpretation of WTO-plus obligations while, at the same time, responding to the need to address the increasing stances for an overall coherence of the system. The Panel's reasoning on the limited effects ascribable to the inherent and sovereign right to regulate trade seems also to reinforce the legitimacy of the approach in this respect. Nevertheless, confronted with China's argument according to which 'the Panel distorted the balance of rights and obligations established in China's Accession Protocol by assuming that China had "abandoned" its right to impose export duties "to promote fundamental non-trade-related interests, such as conservation and public health"',⁹⁸ the Appellate Body would have strengthened, and not undermine, the overall integrity and coherence of the system had it ruled for the admissibility of an exception to the general approach to Article XX GATT in cases where the fundamental interests protected under Article XX b) and g) are at stake. In deciding to preserve the general applicability of the approach over the access to the environmental defences provided for in Article XX b) and g) GATT, the Appellate Body designed a 'rigid' approach and missed the opportunity to further enhance the protection ensured within the WTO system to the fundamental values of conservation and public health in the light of the central importance attached to those values not only within the GATT 1994 but in the definition of the mission of the Organization itself as stated in the first recital of the preamble of the WTO Agreement.

⁹⁸ Appellate Body Report, para. 305.

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